**APPENDIX**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 93-3731

TRAVELERS INSURANCE COMPANY,
*Plaintiff-Appellee,*

v.

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
*Defendant-Appellant.*

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Appeal from the United States District Court
for the Eastern District of Louisiana

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Oct. 25, 1994

Rehearing and Suggestion for Rehearing En Banc
Denied Nov. 23, 1994

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Before HIGGINBOTHAM, JONES, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

St. Jude Hospital of Kenner, Louisiana, Inc. (SJH), one of several defendants in an earlier action by Travelers Insurance Company in which liability was imposed against the limited partnership for which SJH was the general

parner, but not imposed against SJH, challenges on *res judicata* grounds an adverse summary judgment for its secondary liability, as general partner, for the judgment against the partnership. It asserts primarily that, because it was a defendant in the first action, it was necessary for Travelers to press the secondary liability claim then, or be barred by *res judicata* from making it later. We AFFIRM.

I.

In June 1990, Travelers filed a multi-count complaint (the Partnership Litigation) against, *inter alia*, St. Jude Medical Office Building Limited Partnership (Partnership) and SJH, its general partner. One of the counts sought judgment against the Partnership on its promissory note to Travelers. That note was secured by a mortgage on the property on which the Partnership's St. Jude Medical Office Building (the building) stood. The hospital's (SJH's) property was adjacent to that of the building.

The 12-count complaint concerned five distinct transactions: 1) the Partnership's default on the promissory note; 2) the collateral assignment right of leases in the building to Travelers as part of the security for the promissory note; 3) the threat by various defendants to terminate water and sewerage service to the building; 4) the removal of furniture, fixtures, and equipment from the building; and 5) environmental damage to the property. The claims against SJH arose only out of either its ownership of the property adjacent to the building (the third and fifth transactional areas), or its participation in the removal of furniture, fixtures, and equipment from the building (the fourth transactional area). No reference was made to SJH's secondary liability for any judgment rendered against the Partnership.

In answer to the complaint, however, SJH and the limited partners raised the secondary liability defense of discussion "in response to the claims asserted against them

by [Travelers]." [1] But, SJH failed otherwise to pursue the issue.[2]

The jury trial resulted in a judgment against the Partnership. Travelers did not prevail on any of its claims against SJH.

When efforts to collect the judgment from the Partnership failed, Travelers filed this action against SJH, the Partnership's general partner, in order to do so (the SJH Litigation).[3] Both parties sought summary judgment. Travelers asserted that Louisiana law required a partner to pay the debts of its partnership; SJH, that, because of the Partnership Litigation, Travelers' claim was barred by *res judicata*. Primarily, SJH asserted that, because it was a defendant in the Partnership Litigation, Travelers was required to assert all claims against it in that litigation, including any for secondary liability on a judgment against the Partnership. The district court awarded summary judgment to Travelers.

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[1] Discussion is "the right of a secondary obligor to compel the creditor to enforce the obligation against the property of the primary obligor or, if the obligation is a legal or judicial mortgage, against other property affected thereby, before enforcing it against the property of the secondary obligor." La.Civ.Proc. art. 5151.

[2] Article 5155 of La.Civ.Proc. provides that:

> In pleading discussion, the secondary obligor shall: (1) Point out by a description sufficient to identify it, property in the state belonging to the primary obligor, or otherwise subject to discussion, which is not in litigation, is not exempt from seizure, is free of mortgages and privileges, and is worth more than the total amount of the judgment or mortgage; and (2) Deposit into the registry of the court, for the use of the creditor, an amount sufficient to defray the costs of executing the judgment or enforcing the mortgage against the property discussed.

[3] This action is part of the continuing litigation between Travelers and John A. and Robert Liljeberg. *See, e.g., Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 7 F.3d 1203 (5th Cir.1993), *aff'g in part, rev'g in part*[,] 799 F.Supp. 641 (E.D.La.1992) (summary judgment declaring obligation of building lessee to enter into lease

## II.

It goes without saying that we review a summary judgment *de novo*. *E.g., King v. Provident Life and Accident Ins. Co.*, 23 F.3d 926, 928 (5th Cir.1994). Here, there is no dispute of material fact. At issue is whether the district court erred, especially in light of the fact that SJH was a defendant in the Partnership Litigation, in holding that *res judicata* does not bar Travelers, as a judgment creditor of the Partnership, from pursuing that judgment against SJH based on its secondary liability.[4] Although this is a diversity action, federal *res judicata* rules apply in resolving the preclusive effect of the Partnership Litigation, also a diversity action. *Sidag Aktiengesellschaft v. Smoked Foods Prods.*, 776 F.2d 1270, 1273 (5th Cir.1985); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 244 n. 2 (5th Cir.1983).

In this circuit, an action is barred by the doctrine of *res judicata* if: 1) the parties are identical in both actions; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior judgment was final on the merits; and 4) the cases involve the same cause of action. *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir.1983) (en banc) (quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir.1979)). At

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with Travelers); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404 (5th Cir.1994) (appeal of the district court's denial of Rule 60(b)(6) motions); *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 38 F.3d 1414 (5th Cir.1994) (appeal of the district court's quantification of attorneys' fees); *Travelers Ins. Co. v. St. Jude Medical Office Bldg. Ltd. Partnership*, 843 F.Supp. 138 (E.D.La.) (denying motion to recuse, revoking fraudulent conveyances, and awarding sanctions), amended and supplemented, 154 F.R.D. 143 (E.D.La.1994) (quantifying sanctions); *Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 157 F.R.D. 386 (E.D.La.1994) (quantifying sanctions).

[4] In addition, SJH moved unsuccessfully to have Rule 11 sanctions imposed against Travelers on the ground that it brought this action in the face of the claimed *res judicata* bar; it presses that issue here. Obviously, in light of our affirmance, this issue is moot.

issue is only the last factor: whether both cases involve the same cause of action.

To determine whether the same cause of action is involved, our court utilizes a transactional test. *E.g., Agrilectric Power Partners, Ltd. v. General Elec. Co.*, 20 F.3d 663, 665 (5th Cir.1994); *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir.1990); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir.1987). Under this test,

> the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts. The rule is that res judicata "bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, . . . not merely those that were adjudicated."

*Howe*, 913 F.2d at 1144 (quoting *Nilsen*, 701 F.2d at 560) (footnotes omitted).

Louisiana recognizes a partnership as a separate entity; initially, a creditor of a partnership must bring suit against the partnership, but can join the partners in that action. See La.Code Civ.Proc. art. 737;[5] *State v. Morales*, 256 La. 940, 240 So.2d 714, 716 n. 3 (1970); *Falcon Drilling Co. v. Transamerican Energy, Ltd. II*, 622 So.2d 745, 747 (La.App. 3d 1993) (partner may be joined as a party defendant in the original action against the partnership). And, under Louisiana's entity theory of partnership, the creditor of a partnership should seek recovery first against the partnership. *See* La.Civ.Code art. 2817;[6]

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[5] La.Code Civ.Proc. art. 737 provides:

> A partnership has the procedural capacity to be sued in its partnership name. The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

[6] La.Civ.Code art. 2817 states:

> A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the partnership.

*Koppers Co. v. Mackie Roofing & Sheet Metal Works*, 544 So.2d 25, 26 (La.App. 4th 1989) (intent of the law is that recovery be sought first against the primary debtor, the partnership); *see also Federal Deposit Ins. Corp. v. Mmahat*, 960 F.2d 1325, 1328-29 (5th Cir.1992) (general discussion of actions against a partnership, including the partner's secondary liability), *cert. denied*, —— U.S. ——, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

The foregoing discussion of Louisiana partnership law is simply a backdrop to controlling precedent in our circuit, *Mmahat*. There, our court held implicitly that, under Louisiana law, a judgment creditor's claim against a partner for his virile share of a judgment against the partnership does not arise out of the same nucleus of operative facts as the partnership's debt. In *Mmahat*, the Federal Savings and Loan Insurance Corporation (FSLIC) obtained a judgment against Mmahat and the partnership of Mmahat & Duffy for legal malpractice and breach of fiduciary duty (first action). Subsequently, the FSLIC sued Duffy for his virile share of the judgment against the partnership.

Duffy asserted that *res judicata* barred the action against him on the ground that it "arose from the same transaction as" the first action and should have been included in it. 960 F.2d at 1329. We held otherwise, reasoning that the action against Duffy

> does not rest on an identical obligation, nor does it require readjudication of the malpractice claim. [The first action] was based on the malpractice of Mmahat, committed as a partner of the firm. In contrast, [the present action] is based on the pre-existing . . . judgment against Mmahat and [the partnership] and Duffy's virile share of liability for that debt pursuant to Louisiana Civil Code Article 2817. Thus, the FDIC did not pursue a new theory of recovery in

> [the present action]; it sought merely to collect a pre-existing judgment in its favor. Obviously, res judicata would bar [the present action] if the FSLIC had lost in [the former action] because the FDIC would be seeking to relitigate the issue of liability. However, res judicata does not bar the FDIC's suit against Duffy to collect the judgment it obtained against [his] firm.

*Id.* at 1329-30.[7]

There is, however, one differing procedural aspect between this action and *Mmahat*; unlike the partner (Duffy) in *Mmahat*, SJH was a party in the underlying litigation. As noted, SJH hangs its hat primarily on this distinction. In fact, it conceded at oral argument that, had it not been a party in the Partnership Litigation, it would have no basis for claiming *res judicata*. (As discussed, SJH was not sued in the Partnership Litigation for its secondary liability as the general partner; instead, its presence was based on its conduct as an adjacent landowner to the building and its involvement in the removal of property from the building.[8]

SJH presents a distinction without a difference. In essence, it seeks to conflate the first (identical parties)

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[7] The FSLIC instituted each action. Subsequently, Congress abolished the FSLIC; all of its assets, including the claims against the partnership and Duffy, were transferred to the FSLIC Resolution Fund. The Federal Deposit Insurance Corporation (FDIC), as manager of this fund, became the real party in interest in the action. *Mmahat*, 960 F.2d at 1327 n. 5. Accordingly, the court refers to the FDIC as the appellant in *Mmahat*, while the FSLIC was the original plaintiff.

[8] SJH contends also that its secondary liability was raised and litigated in the Partnership Litigation. But, although the facts supporting SJH's secondary liability (*i.e.*, the existence of the Partnership's liability and SJH's status as its general partner) arose during the Partnership Litigation, SJH's secondary liability was not in issue.

and fourth (same cause of action) factors in our *res judicata* analysis. But, because we are dealing with the transactional test aspect (fourth factor), SJH's presence in the Partnership Litigation is immaterial in determining whether this action (the SJH Litigation) is barred. The issue, in its simplest terms, is whether Travelers' claim against SJH in this action arises from the same nucleus of operative facts as in the Partnership Litigation. As stated, pursuant to the holding in *Mmahat*, it does not.[9]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[9] Our court noted in *Kasper Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir.1978), that "[t]he aim of claim preclusion is . . . to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach." The SJH Litigation does not raise entitlement or obligations which were identical to those litigated in the Partnership Litigation. Thus, SJH did not have to relitigate issues from the Partnership Litigation; any repetition of effort common to both actions would be *de minimis*. No doubt, economy and efficiency would have been advanced by asserting in the Partnership Litigation a claim against SJH for secondary liability; but, as much as we counsel—indeed, require—judicial efficiency and economy, they do not trump Travelers' right to bring this action, in light of its not being barred by *res judicata*.

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

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Civ. A. No. 93-173

SECTION: "I" (6)

THE TRAVELERS INSURANCE COMPANY

v.

ST. JUDE HOSPITAL OF KENNER, LA., INC.

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## ORDER AND REASONS

Before the Court are cross motions for summary judgment filed by plaintiff, Travelers Insurance Company ("Travelers"), and St. Jude Hospital of Kenner Louisiana, Inc. ("SJH"). Travelers seeks to have liability imposed on SJH, as a result of its status as general partner of St. Jude Medical Office Building Limited Partnership ("the Partnership"), for the debt owed to Travelers by the Partnership pursuant to this Court's Judgment in the matter entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc. et al.", Civil Action No. 90-1983 c/w No. 90-2601. SJH contends that it was a party to the action from which the Judgment resulted and, because it was not cast in judgment in the previous lawsuit, Traveler's claim against it in this lawsuit is barred by the doctrine of res judicata.

## FACTUAL BACKGROUND

SJH is, and at all material times has been, the general partner of St. Jude Medical Office Building Limited

Partnership, a limited partnership organized and existing under the laws of the State of Louisiana. On December 3, 1992, this Court entered an Amended Judgment in favor of Travelers and against the Partnership in an amount in excess of $4.1 million.

Travelers sets forth as an uncontested material fact that the Partnership has failed to make any payment toward its debt under the Amended Judgment and seeks, through this action, to have SJH cast in judgment for the debts of its partnership.

In response, SJH contends that, because it was a defendant in the previous litigation and was not cast in judgment therein, Travelers' attempt to enforce the judgment against it is barred by res judicata.

## LAW AND ANALYSIS

Under Louisiana law, a partnership is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership. La.Civ.Code art. 2817. A partner may not be sued on a partnership debt unless the partnership is joined as a defendant. La.Code of Civ.Proc. art. 737. Louisiana courts have interpreted these articles to require that a partnership creditor first exhaust his rights against the partnership before he proceeds against the individual partners. *Koppers Co. v. Mackie Roofiing & Sheet Metal Works*, 544 So.2d 25, 26 (La.App. 4th Cir. 1989). The Koppers court went on to note that "there is no requirement that the partners be named defendants in the suit against the partnership. Article 737 [of the Louisiana Code of Civil Procedure] requires only the converse." *Id.*

Our Fifth Circuit was recently called upon to apply these principles and found that "[n]either federal nor Louisiana law requires the joinder of all partners in an

action against a partnership." *FDIC v. Mmahat*, 960 F.2d 1325, 1328 (5th Cir.1992). In *Mmahat*, the FDIC was attempting to enforce a judgment against Peter Duffy on the basis of a judgment it obtained in a previous litigation against the partnership Mmahat & Duffy. Peter Duffy was a partner in Mmahat & Duffy. Duffy argued that res judicata required dismissal of the claim against him on the basis of the prior action against the partnership or not at all. The trial court agreed and dismissed the FDIC's claim against Duffy. In reversing the dismissal, the Fifth Circuit held:

> *Duffy* does not rest on an identical obligation, nor does it require readjudication of the malpractice claim. *Mmahat* was based on the malpractice of Mmahat, committed as a partner of the firm. In contrast, *Duffy* is based on the pre-existing $35 million judgment against Mmahat and M & D and Duffy's virile share of liability for that debt pursuant to Louisiana Civil Code Article 2817. Thus, the FDIC did not pursue a new theory of recovery in *Duffy*; it sought merely to collect a preexisting judgment in its favor. Oviously, res judicata would bar *Duffy* if the FSLIC had lost in *Mmahat* because the FDIC would be seeking to relitigate the issue of liability. However, res judicata does not bar the FDIC's suit against Duffy to collect the judgment it obtained against the firm.

*Id.* at 1329-30.[1]

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[1] This is in accord with Louisiana law, as set forth in *Koppers, supra*, which noted:

> However, when the [district] court dismissed the partners [on the basis of res judicata], the proverbial "catch 22" situation was created. The effect of that ruling is that the partners may never be called upon to satisfy their secondary obligation. Thus, if allowed to stand, the trial court's ruling would make it mandatory that the partners be named as defendants every time a partnership is sued. This is not the law's intent.

This Court concludes that the claim of Travelers against SJH to enforce against SJH the judgment debt of the Partnership is not barred by res judicata. The principal test for comparing causes of action is drawn from § 24 of the Restatement of Judgments 2d, which provides that:

> . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

*Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983). Travelers' rights against SJH arose only when Travelers obtained judgment against the Partnership and the Partnership, in turn, was unable to pay the judgment. The "transactional test" set forth in *Nilsen*, therefore, does not preclude Travelers' claim against SJH.

SJH contends that *Koppers* and *Mmahat* are distinguishable from this case because the partner[s] against whom the creditors in those cases sought to collect the judgment were not made parties to the claims against the partnership. SJH's presence as a party in the litigation against the Partnership, however, does not change the secondary nature of the claim asserted herein by Travelers. The jury that found the Partnership liable to Travelers was not asked to decide whether SJH would be liable to Travelers, whether primarily or secondarily, for that same debt based on its status as general partner of the Partnership. That SJH was not made a part of the judgment in the initial litigation does not relieve it of its obligations as partner. That matter was not before the jury and is not now precluded.

Having decided that Travelers' claim against SJH is not barred, the Court now turns to the issues presented by Travelers' motion for summary judgment against SJH. As discussed above, Louisiana law allows a partner who

has properly plead discussion to compel a creditor of the partnership to enforce its obligation against the assets of the partnership before turning to the individual partner for payment. La.Code of Civ.Proc. art. 5151 *et seq.* These articles place the burden on the partner who invokes discussion to point out the assets of the partnership to the creditor. La.Civ.Code art. 2817, comment (a).

SJH's right to the benefit of discussion does not, however, prevent this Court from granting judgment against it for the debts owed by the Partnership. The Court finds that there is no dispute as to SJH's status as general partner of the Partnership. SJH does not contest this point. The Louisiana codal articles on discussion provide that this Court may enter judgment against SJH along with the Partnership, but require that Travelers first "execute its judgment against the property discussed." La.Code of Civ.Proc. art. 5156. Only after the "property discussed" has been applied toward the judgment and the judgment remains unsatisfied may Travelers proceed to execute its judgment against SJH.

Although SJH has listed discussion as a defense in its Answer, it has not fulfilled the requirements that would entitle it to the benefit of discussion. SJH must properly plead discussion before being entitled to avail itself of its benefits. Louisiana's codal articles on discussion require that:

> In pleading discussion, the secondary obligor shall:
>
> (1) Point out by a description sufficient to identify it, property in the state belonging to the primary obligor, or otherwise subject to discussion, which is not in litigation, is not exempt from seizure, is free of mortgages and privileges, and is worth more than the total amount of the judgment or mortgage; and
>
> (2) Deposit in to the registry of the court, for the use of the creditor, an amount sufficient to defray

> the costs of executing the judgment or enforcing the mortgage against the property discussed.

La.Code of Civ.Proc. art. 5155.

A review of the record reveals that SJH has failed to properly plead discussion of the Partnership's assets. SJH has made no effort to identify assets of the Partnership that can be executed on by Travelers. The Court, therefore, will order that within 15 days from the entry date of this order SJH will identify partnership property which may be "discussed." If the "property discussed" is not identified within such time, judgment shall be entered against SJH without benefit of discussion.

Accordingly,

IT IS ORDERED that:

1. Plaintiff's, The Travelers Insurance Co., Motion for Summary Judgment is GRANTED;

2. Defendant's, St. Jude Hospital of Kenner, La. Inc., Motion for Summary Judgment is DENIED;

3. Within 15 days from the entry date of this order, defendant, St. Jude Hospital of Kenner, La. Inc., will file with the Court the identity and description of partnership property which may be "discussed." If the "property discussed" is not identified within such time, judgment shall be entered against SJH without benefit of discussion. If the property is identified within such time, judgment shall be entered against defendant, St. Jude Hospital of Kenner, Louisiana, Inc., for all amounts owed to plaintiff by St. Jude Medical Office Building Limited Partnership under the Amended Judgment entered on December 3, 1992 in "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc., *et al*", Civil Action No. 90-1983 c/w No. 90-2601, subject to the St. Jude Hospital of Kenner, Louisiana, Inc.'s rights of discussion.

New Orleans, Louisiana, this 18[th] day of May, 1993.

/s/ Henry A. Mentz
United States District Judge

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

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Civ. A. No. 93-0173

SECTION: "I" (2)

THE TRAVELERS INSURANCE COMPANY

v.

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.

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## ORDER AND REASONS

Before the Court is Defendant's Motion for Reconsideration of the Court's Order and Reasons rendered May 18, 1993, which is DENIED for the following reasons.

## BACKGROUND

In a prior motion before the Court, Travelers sought summary judgment against St. Jude Hospital of Kenner, Louisiana, Inc. ("SJH"), as a result of its status as general partner of St. Jude Medical Office Building Limited Partnership ("the Partnership"), for the debt owed to Travelers by the Partnership pursuant to this Court's Judgment in the matter entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc. et al." Civil Action No. 90-1983 c/w No. 90-2601 ("the previous lawsuit"). SJH, in a cross motion for summary judgment, contended that it was a party to the action from which the Judgment resulted and, because it was not cast in judgment in the previous lawsuit, Traveler's claim

against it in this lawsuit is barred by the doctrine of res judicata. In the motion presently before the Court, SJH is seeking reconsideration of this Court's granting Travelers[']motion for summary judgment and denying SJH's motion for summary judgment.

## ANALYSIS

SJH has referred the Court to the transcript of the opening argument of counsel for Travelers in the previous lawsuit and has highlighted statements of counsel regarding SJH as a defendant in that suit. No one denies that SJH was named a defendant in the previous lawsuit or that Travelers sought to find SJH primarily liable for the damages caused to Travelers' collateral. Indeed, the Court directed a verdict in SJH's favor during the conference on jury charges and interrogatories in the previous lawsuit.

Nevertheless, SJH once again reurges in yet another form that because SJH was a party to the previous lawsuit and not cast in judgment, the claim in the present suit is barred by res judicata. The Court by its May 18th order rejected this argument, and by this ruling does so again. SJH has evidently missed the point.

It is true that the Court in it's [*sic*] May 18th Order cited cases in which a claim was allowed against a partner later sued [1] for his share of a judgment previously rendered against the partnership. It is also true that unlike *Mmahat* [2] and its kind where the partner was not named in the earlier suit against the partnership, in this instance SJH was named as a defendant and played an active part in the litigation. But in addition, defense counsel erroneously argue that at that time alone SJH should have been subject to any and all claims against it by Travelers.

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[1] [F]or the first time by the plaintiff[.]

[2] *FDIC v. Mmahat*, 960 F.2d 1325, (5th Cir.1992) [.]

Thus far allusive [*sic*] to SJH is the point which defeats SJH's argument: SJH may have been a party to and an active participant in both the instant case and the previous lawsuit, but the nucleus of operative facts, the common core of facts,[3] are entirely different for each case.

In the previous lawsuit, the thrust was who *did* or *failed to* do what. As stated by SJH at page 9 of its Consolidated Memorandum,

> The 1990 suit was filed against SJH as the sole general partner of [The Partnership] and was based on intentional and negligent acts and omissions concerning among other claims, breach of contract to prove a servitude, the failure to collect rental payments, and actionable waste.

Clearly, the previous lawsuit sounds in tort, totally unlike the instant one which, no matter how it is dressed up, is fundamentally a collection suit.[4] The issues and the facts in the present case have as their core who *owns* what, who possesses it and when. Indeed the whole "who owns what and when" question is so convoluted and intertwined

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[3] See *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) [.] A case where the later claim was barred by res judicata, "the Robinsons 1984 suit is basically the same as the 1981 suit that they tried and lost; in both suits the Robinsons sought to recover for claimed personal injuries, loss of business, and loss of profits arising out of the contamination of the subleased air space by NCR. *The same nucleus of facts is involved, and the relief requested in the two suits is identical.*" Emphasis added, at 1125.

[4] The partnership law issues are a red herring. All parties and the court agree that a third party is entitled by law to proceed against the partner after it has procured judgment against the partnership, and need not name the partner in the action against the partnership. However, debate over partnership law has not successfully distracted focus from the fundamental issue of by whom and with what is the judgment from the previous lawsuit to be paid.

that it has spawned another round of motions [5] and lawsuits [6] in the Liljeberg shell game.

All this Court decided by its directed verdict in the previous lawsuit was that SJH had no duty to provide a servitude, nor did it fail to collect rental payments or commit actionable waste. By their decisions rendered in the previous lawsuit, neither the Court nor the jury decided implicitly or explicitly that a party dismissed from primary liability for damages arising out of tortious acts and omissions was at the same time relieved of a legal obligation to pay a debt derived from its relationship as general partner to the debtor partnership.[7]

Because the facts in the case at bar do not arise from the same core of facts of the previous lawsuit, Travelers' present claim against SJH for the debt owed Travelers by the Partnership is not barred by res judicata. *Robinson*, 808 F.2d at 1125; *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir.1983).[8]

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[5] [E.]g. Opposition of Travelers Insurance Company to List of Partnership Property Which May be Discussed[.]

[6] *In re Liljeberg Enterprises, Inc.*, No. 93-10295B; *The Travelers Insurance Company v. St. Jude Medical Office Building Limited Partnership and Liljeberg Enterprises, Inc.*, Adversary Proceeding No. 93-1119[.]

[7] The previous lawsuit proved a challenge to determine the extent of damages to and the condition, location, and viability of Travelers' collateral and improvements. Travelers understandably chose to proceed another day to determine who owned sufficient assets, when and where, to cover the judgment. The discussion issues have generated sufficient litigation of their own.

[8] [I]n Nilsen, 701 F.2d at 559, the Fifth [C]ircuit stated "For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, *and the same cause of action must be involved in both cases.*" Emphasis added. Of course it is the last criteria which is not met in this case in order

SJH's motion is DENIED. These arguments have been considered and reconsidered by this Court for the last time.

New Orleans, Louisiana, this 21st day of July, 1993[.]

/s/ Henry A. Mentz
United States District Judge

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to bar the claim. It is also the last criteria, that SJH first quoted in its Consolidated Memorandum but later omitted, by strategy or otherwise, in its Reply Memorandum. Indeed it is the last criteria which illuminates where SJH's argument fails.

[Filed Jul. 30, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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Civil Action No. 93-0173
SECTION "I"
MAG. DIV. 4

THE TRAVELERS INSURANCE COMPANY,
*Plaintiff*
versus
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
*Defendant*

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JUDGMENT

Considering this Court's May 20, 1993 Order and Reasons granting the Travelers Insurance Company's motion for summary judgment, the failure of defendant, St. Jude Hospital of Kenner, Louisiana, Inc. to identify property of the St. Jude Medical Office Building, [a] Limited Partnership which may be "discussed" as requested by the May 20 Order, and this Court's July 23, 1993 Order and Reasons denying St. Jude Hospital of Kenner, Louisiana, Inc.'s motion for reconsideration of the May 20 Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is rendered in favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendant, St. Jude Hospital of Kenner, Louisiana, Inc., without benefit of discussion, for any and all damages, interest and other obligations, indebtedness or relief owed to Travelers Insurance Company by the St. Jude Medical Office Building, [a] Limited Partnership pursuant to the

Amended Judgment entered December 3, 1992 in the action entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc., et al" Civil Action NO. 90-1983 c/w No. 90-2601, and for all costs of this proceeding.

New Orleans, Louisiana, this 30th day of July, 1993.

/s/ Henry A. Mentz
United States District Judge

[Filed Aug. 12, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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Civil Action No. 93-0173

SECTION "I"

MAG. DIV. 4

THE TRAVELERS INSURANCE COMPANY,
*Plaintiff*

versus

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
*Defendant*

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AMENDED JUDGMENT

Considering this Court's May 20, 1993 Order and Reasons granting the Travelers Insurance Company's motion for summary judgment, the failure of defendant, St. Jude Hospital of Kenner, La., Inc. to identify property of the St. Jude Medical Office Building, [a] Limited Partnership which may be "discussed" as requested by the May 20 Order, this Court's July 23, 1993 Order and Reasons denying St. Jude Hospital of Kenner, La., Inc.'s motion for reconsideration of the May 20 Order and the Consent Motion to Correct Clerical Error in Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is rendered in favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendant, St. Jude Hospital of Kenner, La., Inc., without benefit of discussion, for any and all damages, interest and other obligations, indebtedness or relief owed to the Travelers Insurance Company by the St. Jude Medical Office Build-

ing, [a] Limited Partnership pursuant to the Amended Judgment entered December 3, 1992 in the action entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, La., Inc., et al" Civil Action NO. 90-1983 c/w No. 90-2601, and for all costs of this proceeding.

New Orleans, Louisiana, this 11th day of August, 1993.

/s/ Henry A. Mentz
United States District Judge

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

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Civ. A. No. 93-0173

SECTION: "I" (2)

THE TRAVELERS INSURANCE COMPANY

v.

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.

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## ORDER AND REASONS

Before the Court are the motions of defendant St. Jude Hospital for new trial, alteration and amendment of judgment, and to vacate judgment. A hearing [1] was held August 25, 1993, and supplemental memoranda were filed subsequent to the hearing. Upon consideration of the argument of counsel, the memoranda, the record, and the law, the Court DENIES the motions as follows:

On May 20, 1993, this Court entered Order and Reasons granting the motion for summary judgment of Travelers Insurance Company (Travelers) and denying the cross motion for summary judgment of St. Jude Hospital of Kenner, La., Inc. (SJH). Because SJH had made no effort to identify assets of the St. Jude Medical Office Building Limited Partnership (the partnership), the Court

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[1] **The hearing on August 25, 1993 was held instead of a status conference convened by the Court's minute entry of August 19, 1993.**

at that time ordered SJH to identify property of the partnership which may be discussed. On June 3, 1993, SJH filed a document entitled "List of partnership property which may be "discussed", stating that pursuant to order of the Court, it does "hereby list, identify and describe all partnership property of [the Partnership], which may be "discussed." The list was as follows:

> 1. A cause of action for damages pending before the 24th Judicial District Court of the State of Louisiana, Division "O", titled "St. Jude Medical Office Building Limited Partnership v. City Glass and Mirror, Inc. et al" and numbered 358-113, being the same cause of action which has been seized by The Travelers Insurance Company pursuant to a writ of fieri facias issued by this Court in Civil Action No. 90-1983 on the docket of this Court.
>
> 2. All of the movable property described by paragraph 15 of the amended judgment of this court in Civil Action No. 90-1983; being the same movable property seized by the Travelers Insurance Company pursuant to a writ issued by this court in Civil Action No. 90-1983 on the docket of this Court.

On June 8, 1993, Travelers filed an "Opposition of Travelers Insurance Company to the list of partnership property which may be discussed." With numerous exhibits attached, the opposition demonstrated in detail the deficiencies of SJH's list as well as SJH's failure to comply with the security deposit requirement. SJH did not reply to Travelers opposition nor did it take any other action regarding the discussion.[2]

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[2] SJH filed its motion to reconsider on June 1, and its List on June 3, 1993. Travelers filed its Opposition to the List on June 8. The Court ruled on the motion to reconsider July 23, 1993 and judgment was entered July 30, 1993. It was not until August 9, 1993 that SJH raised any issue whatsoever of the need for a hearing regarding the discussion.

SJH had, however, previously filed a motion for reconsideration of the May 20th Order which the Court denied July 23, 1993. At the request of the Court, counsel for Travelers prepared a draft judgment, a copy of which was sent to counsel for defendant. On July 30, 1993, the Court entered judgment as follows:

> Considering this Court's May 20, 1993 Order and Reasons granting the Travelers Insurance Company's motion for summary judgment, the failure of defendant, St. Jude Hospital of Kenner, Louisiana Inc., to identify property of the St. Jude Medical Office Building, A Limited Partnership which may be "discussed" as requested by the May 20 Order, and this Court's July 23, 1993 Order and Reasons denying St. Jude Hospital of Kenner, Louisiana, Inc.'s motion for reconsideration of the May 20 Order,
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is rendered in favor of the Travelers Insurance Company, the plaintiff in this action, and against the defendant, St. Jude Hospital of Kenner, Louisiana, Inc., without benefit of discussion, for any and all damages, interest and other obligations, indebtedness or relief owed to Travelers Insurance Company by the St. Jude Medical Office Building, A Limited Partnership pursuant to the Amended Judgment entered December 3, 1992 in the action entitled "Travelers Insurance Company v. St. Jude Hospital of Kenner, Louisiana, Inc., et al" Civil Action No. 90-1983 c/w 90-2601, and for all costs of this proceeding.
>
> New Orleans, Louisiana, this 30th day of July, 1993.

On August 9, 1993 SJH filed a motion for new trial or to alter judgment, which it has subsequently supple-

mented with a motion to vacate judgment. SJH argues [3] that 1) because suit was filed in federal court, discussion pleadings are to be governed exclusively by Federal Rule of Civil Procedure 8; that 2) if La.C.C. Art. 2817 is controlling, it does not require compliance with La. C.C.P. 5155; and that further 3) if La.C.C.P. Article 5155 is indeed controlling, SJH is entitled to a prejudgment hearing on its compliance therewith. Each of these arguments is without merit.

F.R.C.P. 69 *Execution* provides:

> (a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held.

F.R.C.P. 64. *Seizure of Person and Property* provides:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held . . . The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

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[3] The Court agrees that Art. 3045 eliminating the benefit of discussion for sureties does not apply to partners.

The plea of discussion is a procedure which directs the manner, indeed the order in which judgment is executed against a partner vis-a-vis its partnership. It clearly falls within the parameters of F.R.C.P. Rules 64 and 69 and thus is governed by state law. As a consequence, the Court must adhere to the requirements outlined in La. C.C.P. 5155, addressing discussion and security for costs of executing judgment.

In its Order of May 20 the Court stated that SJH "must properly plead discussion before being entitled to avail itself of its benefits." The Court then pointed the defendant directly to the provisions with which it had to comply noting that "Louisiana's codal articles on discussion require that:

> In pleading discussion, the secondary obligor shall:
>
> (1) Point out by a description sufficient to identify it, property in the state belonging to the primary obligor, or otherwise subject to discussion, which is not in litigation, is not exempt from seizure, is free of mortgages and privileges, and is worth more than the total amount of the judgment or mortgage; and
>
> (2) Deposit into the registry of the court, for the use of the creditor, an amount sufficient to defray the costs of executing the judgment or enforcing the mortgage against the property discussed.
>
> La.Code of Civ.Proc. art. 5155."

The Court need not have elaborated further as to what was required to properly plead discussion.

The Court noted however, that SJH "has made no effort to identify assets of the partnership that can be executed on by Travelers" and gave SJH 15 days in which to do so, or "judgment shall be entered against SJH without benefit of discussion." Clearly, by so ordering the Court was not decreeing that SJH need not properly

plead discussion nor deposit security to cover costs. The Court was merely setting a deadline to patently overworked and protracted litigation.

Defendant argues that it should have had prejudgment notice of the Court's determination of whether its defense of discussion factually satisfied the applicable legal requirements. It is inconceivable SJH could have had more explicit notice. In its Order of May 20, the Court spelled out in plain English the description and security requirements of Art. 5155, allowing 15 days to comply.

Yet to date, Defendant SJH has failed to deposit security to defray costs into the registry of the Court. Indeed, SJH maintains it need not, arguing La.C.C. Art. 2817 makes no such requirement. Defendant is misguided.

La.C.C. Art. 2817 provides:

> A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

In the Revision Comments of 1980 to Art. 2817, section (d) specifically provides that "a partner's right of discussion is governed by . . . Code of Civil Procedure Article 5155."

Defendant's position is untenable, as repeatedly held by Louisiana courts for well over a century. *Robechot v. Folse*, 11 La. 133 (La. 1837) (where the court ruled the plea of discussion was correctly overruled "as there was no actual tender of any specific sum to meet the expenses of the discussion"[4]); *Thompson-Ritchie Grocery Co. v. Cary*, 17 La.App. 270, 135 So. 707 (1931) (where the court held that a plea of discussion "*need not be examined on its merits* as [defendant] did not in any manner comply with the law on this subject . . ., which re-

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[4] 11 La. at 135[.]

quired that specific property be designated for discussion, and that the necessary funds be provided" [5]).

In the instant case, the record clearly shows that defendant SJH has failed to deposit any amount into the registry of this Court to defray the costs of execution. The Court need not have interpreted an iota of defendant's list to draw such a conclusion. Neither need the Court hold a hearing to illuminate the issue. Defendant was noticed of the Court's concern as to this requirement by its Order of May 20. And the record, to this day [6], plainly reflects that defendant has failed to comply with section (2) of Article 5155, requiring a deposit into the Court's registry. Contrary to SJH's contention, the holdings of *Robechot*, and more particularly of *Thompson-Ritchie*, apply to the precise circumstances of this case.

At the hearing on August 25, 1993, SJH conceded that the Court might well draw the same conclusion were the judgment vacated and a prejudgment hearing held to argue whether SJH had properly plead [*sic*] discussion. SJH nevertheless wants the hearing, it insisted, in order to build its record for appeal. SJH cites no authority for its right to a hearing, which the Court finds unconvincing in light of *Thompson-Ritchie*.

As to its argument for building a record on appeal, the Court is appalled that SJH should now stand and cry foul. What conceivably could SJH introduce to refute a record which *already* contains *incontrovertible* evidence that the Liljeberg entities are *simultaneously* 1) represent-

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[5] 135 So. at 709. There is further authority that "the plea of discussion can be made but once." *Hill, McLean & Co. v. John A. Miller*, 7 La. Ann. 621, 623 (1852) [.] The Court was accommodating defendant to allow amplification of its initial answer pleading discussion.

[6] Having had a hearing on August 25, 1993, SJH still erroneously holds the position that La.C.C. Art. 2817 does not require compliance with La.C.C.P. Art. 5155.

ing to this Court that the movables[7] are owned by the Partnership, 2) representing to the Bankruptcy Court these same movables are owned by Liljeberg Enterprises, Inc. and 3) representing to the Fifth Circuit Court of Appeals that a previous finding of this Court, that the movables *are* owned by the partnership, was clearly erroneous![8] See exhibits to Travelers' opposition to the list and to Travelers' opposition to this motion to alter highlighting transcripts, depositions, and pleadings of SJH to this effect.

A superficial reading of these exhibits illustrates the recklessness with which defendants have constructed their allegations, but such an exercise would nevertheless require examination of the record, delving[9] deeper than the pleadings. Hardly fit grist for due process, such an exercise was totally unnecessary to the Court's finding.

The Court found that SJH further failed to comply with La.C.C.P. Art. 5155(1), again from the face of the pleadings alone. From the very language employed, a cursory view of SJH's list reveals the assets listed to be in litigation and not free of mortgages. Furthermore, the list fails to demonstrate the worth of the assets to exceed the total amount of the judgment, all in violation of Art. 5155(1). Fortunately, with such conflicting sworn evidence before it, the Court need not have reached a determination of ownership, hardly public and notorious. In sum, SJH has failed to identify property of the partnership which may be discussed, as requested by the Order of May 20. The

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[7] [D]esignated as Item # 2 of SJH's list.

[8] Indeed it appears that SJH has elevated the meaning of movables to a unique species of fungible. Perhaps after all a hearing would have been the proper forum for SJH to introduce such a novel argument.

[9] [A]ssuming for the moment the Court could eradicate from its memory knowledge of the basis for appeal of its decision to the Fifth Circuit[.]

judgment of the Court of June 30, 1993, was properly rendered.

It is an elementary principle of the contract of suretyship, that the creditor ought not to be subjected to a troublesome, difficult, and protracted discussion. *Hill, McLean & Co. v. John A. Miller*, 7 La. Ann. 621, 623 (1852)[10]. To the extent the Court may have been willing to vacate its Judgment at the request of SJH, this option was foreclosed by the bankruptcy proceedings commenced by SJH within days of Travelers' recordation of the judgment. Were the court to vacate its judgment, Travelers would lose its secured position for a meaningless exercise of procedural handwashing.

Nevertheless, inadvertently omitted from its July 23 order was the Court's ruling on defendant's plea of discussion, to wit,

> Inasmuch as SJH's Answer and its List of Partnership Property which may be Discussed do not on their face comply with the requirements of La.C.C.P. Article 5155, SJH has failed to identify property which may be discussed or to deposit security with the Court to defray costs of execution, such that judgment shall be entered against SJH without benefit of discussion, as stated in the Court's Order of May 20.

In light of this error and pursuant to F.R.C.P. 60(a) and 61, the Court on its own initiative orders this omission to be rectified and the order to be amended accordingly.

In view of the foregoing,

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[10] "Of the slaves, the description is totally deficient; and admitting the plantation to have been well known, and the possession of the defendant, public and notorious, we can not hold the description in the plea, to have been sufficient to maintain the right of discussion, claimed by the defendant." 7 La. Ann. at 624.

1. IT IS ORDERED that defendant SJH's motion for new trial or to alter judgment is DENIED;

2. IT IS FURTHER ORDERED that defendant SJH's supplemental motion for new trial is DENIED;

3. IT IS FURTHER ORDERED that defendant SJH's second supplemental motion for new trial, alteration, and amendment of judgment, and to vacate judgment is DENIED.

4. IT IS FURTHER ORDERED that the Order and Reasons of July 23, 1993, be amended to include the following sentence:

> Inasmuch as SJH's Answer and its List of Partnership Property which may be Discussed do not on their face comply with the requirements of La.C.C.P. Article 5155, SJH has failed to identify property which may be discussed or to deposit security with the Court to defray costs of execution, such that judgment shall be entered against SJH without benefit of discussion, as stated in the Court's Order of May 20.

5. IT IS FURTHER ORDERED that the hearing set for September 8, 1993, is hereby CANCELLED, as per previous oral notification.

New Orleans, Louisiana, this 29th day of September, 1993.

/s/ Henry A. Mentz
United States District Judge

[Filed Nov. 23, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-3731

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TRAVELERS INSURANCE COMPANY,
*Plaintiff-Appellee,*
versus
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
*Defendant-Appellant.*

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Appeal from the United States District Court
for the Eastern District of Louisiana

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) FOR REHEARING EN BANC

(November 23, 1994)

Before HIGGINBOTHAM, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing is (are) DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

## STATUTORY PROVISIONS INVOLVED

La. Code Civ. Proc. art. 737. Partnership; partners

A partnership has the procedural capacity to be sued in its partnership name.

The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

La. Civ. Code art. 2817. Partnership debts; liability

A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.